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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. **300**

JERRY BRUNO,

Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,

Respondent and Appellee below.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

M_s MICHAEL EDELSTEIN,
Counsel for Petitioner.

INDEX.

	PAGE
Petition	1
Summary Statement of the Matter Involved	1
Reasons Relied on for the Allowance of the Writ ..	5
Brief in Support of Petition	8
Opinions of the Courts Below	8
Jurisdiction	8
Statement of the Case	9
Specifications of Errors	9
Summary of the Argument	10
Argument	11
A—Petitioner's requested charge, that no presumption shall be made by the jury because of the Petitioner's failure to testify, should have been granted	11
B—Prejudicial variance existed between the conspiracy charge in the indictment and the crimes established by the evidence	13
C—Government's Exhibit 25 was incompetent and improperly received in evidence, having been obtained in violation of the provisions of the Federal Communications Act	15
Conclusion	16
Appendix A	17

Table of Cases Cited.

	PAGE
Berger v. U. S., 295 U. S. 78 (1935)	10, 13, 14
Diamond v. United States, 94 Fed. (2) 1012 (C. C. A. 6, 1938)	6, 15
Hersch v. U. S., 68 Fed. (2) 799, 802 (C. C. A. 9, 1934)	5, 11, 12
McKnight v. United States, 115 Fed. 972, 981 (C. C. A. 6, 1902),	11
Michael v. United States, 7 Fed. (2) 865 (C. C. A. 7, 1925)	5, 12
Sablowsky v. United States, 101 Fed. (2) 183 (C. C. A. 3, 1938)	6, 15
Stout v. U. S., 227 Fed. 799, 803, 804 (C. C. A. 8, 1915)	5, 12
Swenzel v. U. S., 22 Fed. (2) 280 (1927)	5
U. S. v. Bruno, decided July 10, 1939, unreported	5
United States v. Weiss, 103 Fed. (2) 348 (C. C. A. 2, 1939)	6, 15
United States v. Nardone, 302 U. S. 379 (1937) ...	6, 15
United States v. Katz, 271 U. S. 354, 355 (1925) ..	14
United States v. Peoni, 100 Fed. (2) 401 (C. C. A. 2, 1938)	14
Valli v. United States, 94 Fed. (2) 687 (C. C. A. 1, 1938)	6, 15
Wilson v. United States, 149 U. S. 60, 67 (1892) ..	11, 12

Statutes Cited.

Title 28 U. S. C. §632	3, 5, 10, 12, 17
47 U. S. C. §605	5, 6, 17

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No.

UNITED STATES OF AMERICA,
Respondent and Appellee below.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

To the Honorable, the Supreme Court of the United States:

The petition of Jerry Bruno respectfully shows:

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Summary Statement of the Matter Involved.

Petitioner was convicted by a jury, after a trial in the United States District Court for the Southern District of New York, upon an indictment (R. 7) charging him and some eighty-seven other defendants with having conspired to violate certain United States Statutes relating to the importation of, and payment of duties and taxes upon narcotic drugs.

Petitioner was sentenced to serve a term of two years and to pay a fine of five thousand (\$5000.00) Dollars (R. 5).

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon the ground that the trial court had erred in making certain rulings. The Circuit Court in a *per curiam* opinion (R. 417) by Judges L. Hand, A. N. Hand and Clark affirmed the conviction.

The first question raised by petitioner involves the following request to charge which was denied by the trial court (R. 345, 407):

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

Petitioner did not testify at the trial. On this point the trial court in its charge stated (R. 332):

"It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony."

The Circuit Court below stated that the trial court's charge was not the equivalent of the charge requested (R. 419).

The Circuit Court disagreed with the view held by other Circuit Courts that the refusal of the trial court to give

the requested charge is reversible error. It disagreed on the ground that it believed such a charge to be futile, as the attention of the jury is drawn to the fact that defendant did not take the stand. The Circuit Court seems to have overlooked the fact that the trial court in its charge had already called this matter to the attention of the jury by stating a defendant might elect whether or not to testify. Thus the trial court had created the situation which petitioner's request to charge sought to remedy.

Petitioner respectfully submits that the Circuit Court erred in its interpretation of the statute applicable to this situation (Title 28, U. S. C. §632). The failure of the trial court to charge as requested seriously prejudiced the consideration of his case by the jury. The doctrine enunciated by the Circuit Court below (R. 420), in upholding the trial court, is novel and violates the intent of the provision contained in the Constitution of the United States, Article V which provides that no person "shall be compelled in any criminal case to be a witness against himself."

The next point involves the contention raised in the trial court that the prosecution proved several distinct conspiracies instead of the single one alleged, and that the submission of multiple and complex issues involving numerous defendants prejudiced the consideration of petitioner's case by the jury (R. 273).

The Circuit Court stated (R. 417) that it could be found from the evidence, that four distinct groups existed, smugglers who imported the drugs, middlemen who purchased the drugs from the smugglers, and who in turn resold them to at least two groups of retailers. The Circuit Court admitted that the evidence did not show any co-operation between the smugglers and the retailers or among the separate retailers. In spite of the evidence the Circuit Court reached the conclusion that there was a single conspiracy because the smugglers must have

known that the middlemen must sell to retailers and the retailers knew that the middlemen must buy from importers (R. 418).

Petitioner submits that the view set forth by the Circuit Court for holding that one conspiracy existed, has no legal basis. A conspiracy is based on agreement, more or less definite, to do specific acts, or accomplish a particular result. Here the evidence fails to indicate that the smuggler group were concerned in any way with the activities of the retail groups. The smugglers' interest ended when they received their money and delivered the contraband. The middleman received no pay from the smugglers for their enterprise in distribution, nor did they share in the smuggler's receipts. That each group knew that others might be engaged in similar activities does not warrant a finding that the groups were members of one group of conspirators. The evidence shows that the same analysis holds true for the relationship between middlemen and retailers. In fact the group of retailers, of which petitioner allegedly was a member, could obtain no narcotics and disbanded long before the arrest of the middlemen, whose arrest in turn took place months before the western retailers were apprehended.

Petitioner was prejudiced by the fact that multiple and complex issues, involving numerous defendants, were submitted to the jury for decision whereas, if the conspiracy with which petitioner were charged were submitted to the jury, a simple issue only involving two defendants would have been presented. Evidence was admitted relating to members of other conspiracies showing their participation in immoral and criminal enterprises unconnected with the conspiracy charged in the indictment. Petitioner was entitled to a fair consideration of the specific charge against him. The prosecution by consolidating the various different conspiracies and numerous defendants made it difficult to submit to the jury the simple issue of petitioner's guilt.

The next question relates to the admission, over objection, of evidence (Gov. Ex. 25 in evidence, admitted R. 267; printed R. 350) derived through the unlawful tapping of a telephone. The evidence consisted of a written record of what was heard when an alleged conspirator, in the presence of an agent purported to telephone the petitioner. The telephone conversation took place in New York City.

Petitioner submits that such evidence was incompetent, having been obtained in violation of the provisions of the Federal Communications Act (47 U. S. C. §605).

II.

Reasons Relied on for the Allowance of the Writ.

1—There is a diversity of opinion between the Circuit Courts of Appeals for the Second, Seventh, Eighth and Ninth Circuits as to whether or not a defendant is entitled to a requested charge that no presumption shall be made by the jury because of the said defendant's failure to testify. The Second Circuit holds that the defendant is not entitled to the charge. (*Swenzel v. U. S.*, 22 Fed. [2] 280 [1927]; *U. S. v. Bruno*, decided July 10, 1939, unreported.) The Seventh, Eighth and Ninth Circuits hold a defendant is entitled to such a charge. (*Hersch v. U. S.*, 68 Fed. [2] 799, 802 [C. C. A. 9, 1934]; *Stout v. U. S.*, 227 Fed. 799, 803, 804 [C. C. A. 8, 1915]; *Michael v. United States*, 7 Fed. [2] 865 [C. C. A. 7, 1925]).

2—The question of the charge to the jury involves the interpretation of a Federal Statute (Title 28 U. S. C. §632) and of the Constitution of the United States (Article V—provision against self-incrimination). This question has not been passed upon by the United States Su-

preme Court and is of sufficient importance to the judicial administration of trials in criminal cases to warrant its consideration.

3—There is a diversity of opinion between the Circuit Courts of Appeals for the First, Second, Third and Sixth Circuits as to whether or not the provision of the Federal Communications Act affect intrastate communications. The Third and Sixth Circuits hold that it does and that evidence obtained by illegal interception of intrastate communications is inadmissible. *Sablowsky v. United States*, 101 Fed. (2) 183 (C. C. A. 3, 1938); *Diamond v. United States*, 94 Fed. (2) 1012 (C. C. A. 6, 1938). The First and Second Circuits hold that the act only affects interstate communications, and that such evidence though illegally obtained is admissible. *Valli v. United States*, 94 Fed. (2) 687 (C. C. A. 1, 1938); *United States v. Weiss*, 103 Fed. (2) 348 (C. C. A. 2, 1939).

4—Whether or not evidence obtained by illegal interception of an intrastate message is admissible, involves the interpretation of a Federal statute (47 U. S. C. §605). In *United States v. Nardone*, 302 U. S. 379 (1937), this court passed upon said statute and decided that evidence obtained by the illegal interception of an interstate communication is inadmissible. Petitioner submits that it is important to proper judicial administration that this court decide whether the *Nardone* decision is also applicable to intrastate messages.

5—This case involves an important question affecting the law of criminal conspiracy. The evidence showed that petitioner was a purported member of a group of people (retailers) purchasing narcotic drugs from another group (middlemen) who in turn purchased from a group of smugglers. Another group (retailers) existed who also

purchased from the middlemen. The Circuit Court upon the presumption that the retailers and smugglers must have had knowledge of each other's activities, held that all the groups were engaged in a single conspiracy. Petitioner contends that each group was engaged in a separate illegal enterprise and that a sale from one group to another did not make the buying and selling groups conspirators. Petitioner believes that the holding of the Circuit Court seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

WHEREFORE, your petitioner prays that Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit directing said court to certify and send to this court a full and complete transcript of the record and the proceedings of the said Circuit Court, had in the case numbered and entitled on its docket, Cal. No. 339, *United States of America, Appellee v. Jerry Bruno, Appellant*, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this court; and for such other and further relief as to this court may seem proper.

Dated, August 16, 1939.

JERRY BRUNO,
By M. MICHAEL EDELSTEIN,
Counsel for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

JERRY BRUNO,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

No.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

Opinions of the Courts Below.

There was no opinion rendered by the trial court relating to the within petitioner. The opinion of the Circuit Court below (R. 417) rendered July 10, 1939, is still unreported.

II.

Jurisdiction.

A. The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on July 20, 1939 (R. 422).

B. The jurisdiction of this court is invoked pursuant to the provisions of Title 28, U. S. Code, §347, subdiv. a (Judicial Code §240-a, as amended), and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States.

C. The reasons stated in the preceding petition under II (pp. 5-7), herewith adopted and made a part of this brief, are believed to constitute good grounds for invoking the jurisdiction of this court.

III.

Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-5) which is hereby adopted and made a part of this brief.

IV.

Specifications of Errors.

A. The Circuit Court erred in holding that the trial court correctly refused to make the following charge (Assignment of Error No. 10, R. 407):

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

B. The Circuit Court erred in holding that there was no variance between the conspiracy charged in the indictment and the proof offered on trial. (Assignments of Error Nos. 5, 6, 7, R. 405.)

C. The Circuit Court erred in holding that the trial court properly admitted into evidence Government's Exhibit 25 (R. 142-146, admitted 267, printed 350) obtained by Government agents by the illegal interception of an intrastate telephone message.

V.

Summary of the Argument.

A. Petitioner's requested charge that no presumption shall be made by the jury because of the petitioner's failure to testify should have been granted because,

(1) the trial court in its charge had mentioned that the defendants had the privilege of electing whether or not to testify, and

(2) Such a charge is mandatory under Article V of the Constitution and Title 28, U. S. Code, §632.

B. Prejudicial variances existed between the conspiracy charged in the indictment and the crimes established by the evidence. Application of the rule in *Berger v. U. S.*, 295 U. S. 78 (1935), required the granting of petitioner's motion to dismiss the indictment, to acquit the petitioner and to set aside the verdict, respectively made in the trial court.

C. Government's Exhibit 25 was incompetent and improperly received in evidence, having been obtained in violation of the provisions of the Federal Communications Act.

ARGUMENT.**A.**

Petitioner's requested charge, that no presumption shall be made by the jury because of the Petitioner's failure to testify, should have been granted.

1. *Because the Trial Court in its Charge had mentioned that the Defendants had the Privilege of Electing Whether or Not to Testify.*

The trial court by mentioning the defendants' privilege of electing to testify (R. 332) brought to the jury's attention the failure of petitioner to make such election. The Circuit Court's view (R. 420) that the failure of a defendant to testify should be kept in the background as much as possible for his protection, therefore has no force herein. The matter having been placed before the jury, it would draw the very conclusion the statute (28 U. S. C., §632) sought to avoid. Petitioner was therefore entitled to the charge. *Hérsch v. United States*, 68 Fed. (2) 799, 807 (C. C. A. 9, 1934). Failure to give the charge under these circumstances constituted error.

Wilson v. United States, 149 U. S. 60, 67 (1892);
McKnight v. United States, 115 Fed. 972, 981
(C. C. A. 6, 1902).

2. *Because Such a Charge is Mandatory Under Article V of the Constitution and Title 28, U. S. Code, §632.*

At common law a defendant could not be compelled to testify against himself; nor could he testify in his own behalf. The rule against self-incrimination was incor-

porated in the Fifth Amendment to the Constitution. To permit defendants to testify in their own behalf, there was enacted in 1878 the statute now contained in Title 28, U. S. C., §632. In conformance to the constitutional provision against self-incrimination, this enactment stated no presumption should be made from the failure of a defendant to testify. See *Wilson v. United States, supra*, 65.

As the enactment did not, and could not, modify the constitutional protection accorded a defendant, petitioner was entitled to the requested charge setting forth the right of a defendant not to be compelled to incriminate himself. Petitioner was likewise entitled to a statement of the law as contained in 28 U. S. C., §632, showing not only his privilege of election to testify, but his protection from presumption in the event of non-exercise of the privilege. The refusal to give the requested charge completely deprived petitioner of the protection of the constitutional provision against self-incrimination.

The view of the Circuit Court below that anything said about the defendant's failure to testify brings the matter prejudicially before the jury, is untenable and speculative. Such a view is based on the assumption that the jury hearing the case does not see what is obvious to court and counsel. The failure of a defendant to take the stand is already prejudicially before the jury if nothing is said of his right against self-incrimination. A defendant's only opportunity to remove the prejudice lies in an impressive charge concerning defendant's right. Petitioner alone had the right to decide whether or not the charge was necessary to his defense. Having made the request it should have been granted. *Michael v. United States*, 7 Fed. (2) 865, 866 (C. C. A. 7, 1925); *Stout v. United States*, 227 Fed. 799, 803 (C. C. A. 8, 1915); *Hersch v. United States, supra*, 807.

B.

Prejudicial variance existed between the conspiracy charge in the indictment and the crimes established by the evidence.

Application of the rule stated in *Berger v. United States*, 295 U. S. 78 (1935), required the granting of petitioner's motions at the trial based on such variance. The Circuit Court in its opinion stated (R. 417) and it is not disputed, that at least four distinct groups existed as revealed from the evidence at the trial. One group consisted of smugglers who imported the drugs; a second group of middlemen who purchased the drugs from the smugglers and resold them to retailers; and two groups of retailers, one in New York, of which petitioner was allegedly a member, and the other operating in the western part of the United States. The Circuit Court conceded that the evidence showed no co-operation between the smugglers and the retailers, or between the two groups of retailers. In spite of this the Circuit Court reached the conclusion that these groups constituted a single set of conspirators.

The view set forth by the Circuit Court is based on a presumption that the smugglers must have known that the middlemen were selling to retailers and the retailers must have known that the middlemen were purchasing from the smugglers. This view has no legal basis. Each transaction between the smugglers and the middlemen constituted a sale. The smugglers' interest ended when they received their money and turned over the contraband. The middlemen received no pay from the smugglers for distributing the contraband, nor did they share in the smugglers' receipts. That each group knew that the other might be engaged in similar illegal activity does

not warrant a presumption that the groups constituted one set of conspirators.

The same analysis holds true for the relationship between the middlemen and the separate groups of retailers. The only transaction between the middlemen and the retailers was the sale of narcotics and the receipt of money. Neither the retailers nor the middlemen had any other interest in each other's activities. In fact, the group of retailers of which petitioner allegedly was a member (the Mauro group) terminated its existence in December, 1936 (R. 61, 71, 72), whereas the middlemen were not arrested until May, 1937 (R. 31, 32). The other group of retailers in the West were not apprehended until about October, 1937.

The Supreme Court has indicated that there can be no conspiracy between the buyer and the seller unless some element is present other than the sale itself. *United States v. Katz*, 271 U. S. 354, 355 (1925). Successive sales do not link the successive buyers and sellers into a conspiracy. *United States v. Peoni*, 100 Fed. (2) 401 (C. C. A. 2, 1938). The fact that the buyer and the seller in this case was in each instance a group rather than an individual does not change the legal situation.

In this case the variance was prejudicial to the petitioner because of complexity of the issues involved, the numerous witnesses heard and the type of evidence admitted against defendants other than petitioner. Under the rule of the *Berger* case variance is fatal only if prejudice be established. In the instant case the trial continued for a month. The transactions covered a period of several years. Eighty-eight defendants were named in the indictment and seventy-seven witnesses appeared before the jury. Evidence was admitted against other defendants which was not competent or material to the charge against the petitioner. The evidence was of a highly prejudicial nature and showed that these other defend-

ants were engaged in various illegal activities such as prostitution (R. 153, 216, 224), loan shark dealings (R. 71, 97, 98), fraud and thievery (R. 33, 35, 46; R. 88, 89-91), gambling (R. 87, 98). The general character of the evidence produced, the length of the trial, the jumble of names, places and dates, all contributed to the serious prejudice of petitioner's trial. Motions made in the trial court based on the variance between the proof offered and the charge in the indictment should have been granted.

C.

Government's Exhibit 25 was incompetent and improperly received in evidence, having been obtained in violation of the provisions of the Federal Communications Act.

The question of the admissibility of evidence of an intrastate communication obtained by wire tapping, has been passed upon in the Circuit Courts of Appeals in the First, Second, Third and Sixth Circuits. *Valli v. United States*, 94 Fed. (2) 687 (C. C. A. 1, 1938), and *United States v. Weiss*, 103 Fed. (2) 348 (C. C. A. 2, 1939) hold such evidence admissible. *Sablowsky v. United States*, 101 Fed. (2) 183 (C. C. A. 3, 1938) and *Diamond v. United States*, 94 Fed. (2) 1012 (C. C. A. 6, 1938), hold such evidence inadmissible.

The views set forth in the *Sablowsky* case are in conformance with the spirit of the decision of the Supreme Court in *Nardone v. United States*, 302 U. S. 379 (1937). Although the communications under consideration in the *Nardone* case were interstate in character, that feature was of little importance in the decision of the case. The Supreme Court viewed the practice of wire tapping by federal officers as a grave wrong. It seems clear that the wrong is not lessened when the communication is intra-state rather than interstate.

CONCLUSION.

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

M. MICHAEL EDELSTEIN,
Counsel for Petitioner.

APPENDIX A.

28 U. S. Code §632.

"§632. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and court-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (Mar. 16, 1878, c. 37, 20 Stat. 30.)"

47 U. S. Code §605.

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers, of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;

and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, concepts, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.: * * *

